

No. 87-399

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JOSEPH F. SPANIOLO, JR.

In The  
**Supreme Court of the United States**  
October Term, 1987

— o —  
SUPREME COURT OF VIRGINIA, and  
its Clerk, DAVID B. BEACH,

*Appellants,*

v.

MYRNA E. FRIEDMAN,

*Appellee.*

— o —  
**ON APPEAL FROM THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

— o —  
**APPELLANTS' BRIEF**  
— o —

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## QUESTIONS PRESENTED

1. Is admission to a State's bar, without taking and passing that State's bar examination, a fundamental right protected by the privileges and immunities clause of Article IV, Section 2 of the United States Constitution?

2. Does the privileges and immunities clause invalidate the Supreme Court of Virginia's determination that there are substantial reasons for requiring an applicant for licensure, who is already admitted to the bar of another State, to either (1) take and pass the Virginia bar examination, or (2) reside in the Commonwealth in lieu of examination, in order to demonstrate a commitment by the applicant of service to the jurisdiction, and to ensure the attainment by the applicant of proficiency in Virginia law and procedure?

3. Does the privileges and immunities clause impose a stringent standard of justification against the Supreme Court of Virginia's rule requiring residence for admission to the bar without examination where there is no clear discrimination against nonresidents, and where any resident of any state may be admitted to practice in Virginia by taking and passing the bar examination?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
JURISDICTION .....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	3
1. FACTUAL BACKGROUND .....	3
2. OVERVIEW OF STATUTORY FRAMEWORK AND RULES RELATING TO ADMISSION TO THE BAR IN VIRGINIA .....	5
3. SUMMARY OF VIRGINIA BAR COMPOSITION .....	7
4. OVERVIEW OF RECIPROCITY ADMISSION REQUIREMENTS AMONG THE SEVERAL STATES .....	8
SUMMARY OF ARGUMENT .....	10
ARGUMENT .....	13
I. ADMISSION TO A STATE'S BAR WITHOUT EXAMINATION IS NOT A "FUNDAMENTAL PRIVILEGE" PROTECTED BY THE PRIVILEGES AND IMMUNITIES CLAUSE ..	13
A. ADMISSION TO A STATE'S BAR UPON WAIVER OF THE BAR EXAMINATION MAY PROPERLY BE VIEWED INDEPENDENTLY OF THE RIGHT TO PRACTICE LAW GENERALLY .....	14
B. THERE IS NO OVERRIDING NATIONAL INTEREST IN BAR ADMISSION WITHOUT EXAMINATION WHICH REQUIRES PROTECTION BY THE PRIVILEGES AND IMMUNITIES CLAUSE .....	17

## TABLE OF CONTENTS—Continued

	Page
II. VIRGINIA'S REQUIREMENT OF EITHER EXAMINATION OR CONTINUING RESIDENCE FOR ATTORNEYS SEEKING MULTI-JURISDICTIONAL BAR MEMBERSHIP IS SUBSTANTIALLY RELATED TO VIRGINIA'S COMPELLING INTEREST IN MAINTAINING A COMPETENT BAR COMMITTED TO SERVING THE PUBLIC IN THIS STATE .....	22
A. NONRESIDENT ATTORNEYS WITH MULTIPLE BAR MEMBERSHIP WHO SEEK ADMISSION TO ANOTHER STATE'S BAR PRESENT PECULIAR OR SPECIAL PROBLEMS WHICH JUSTIFY DIFFERENT TREATMENT .....	28
B. VIRGINIA'S INTERESTS IN REQUIRING A COMMITMENT TO THE JURISDICTION ARE SUBSTANTIAL .....	29
C. VIRGINIA'S INTERESTS IN PROMOTING COMPLIANCE WITH ITS FULL-TIME PRACTICE REQUIREMENT ARE SUBSTANTIAL .....	35
III. A STRINGENT APPLICATION OF THE LESS RESTRICTIVE MEANS TEST IS INAPPROPRIATE IN THIS CASE, BECAUSE NONRESIDENTS ARE NOT EXCLUDED FROM ADMISSION TO THE VIRGINIA BAR, AND PASSING THE STATE'S BAR EXAMINATION IS A "REASONABLE AND ADEQUATE" MEANS BY WHICH ADMISSION MAY BE OBTAINED .....	41
CONCLUSION .....	49
APPENDIX .....	App. 1
RULE 1A:1 .....	App. 1
RULE 1A:3 .....	App. 2

## TABLE OF AUTHORITIES

CASES	Pages
<i>Alerding v. Ohio High School Athletic Association</i> , 779 F.2d 315 (6th Cir. 1985) .....	17
<i>Attwell v. Nichols</i> , 466 F.Supp. 206 (N.D.Ga.), <i>Aff'd</i> , 608 F.2d 228 (5th Cir. 1979) .....	19
<i>Baldwin v. Montana Fish and Game Commission</i> , 436 U.S. 371 (1978) .....	14, 26, 27
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 (1977) .....	30, 31
<i>Brown v. Supreme Court of Virginia</i> , 414 U.S. 1034 (1973), <i>summarily aff'g</i> , 359 F.Supp. 549 (E.D. Va.) .....	11, 20, 21, 25
<i>Button v. Day</i> , 204 Va. 547, 132 S.E.2d 292 (1963) .....	30
<i>Canadian Northern Railway Company v. Eggen</i> , 252 U.S. 533 (1920) .....	12, 45
<i>Doran v. Salem Inn, Inc.</i> , 422 U.S. 992 (1975) .....	2
<i>Frazier v. Heebe</i> , — U.S. —, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987) .....	18, 24, 44
<i>Friedman v. Supreme Court of Virginia</i> , 822 F.2d 423 (1987), <i>probable jurisdiction noted</i> , Novem- ber 2, 1987 .....	34, 39
<i>Goldfarb v. Supreme Court of Virginia</i> , 766 F.2d 859 (4th Cir. 1985), <i>cert. denied</i> , 106 S.Ct. 862 (1986) .....	19, 20, 25, 31, 47
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773 (1975) .....	43
<i>Hicklin v. Orbeck</i> , 437 U.S. 518 (1978) .....	42, 44
<i>Hicks v. Miranda</i> , 422 U.S. 332 (1975) .....	20
<i>Hoover v. Ronwin</i> , 466 U.S. 558 (1984) .....	44
<i>In Re Brown</i> , 213 Va. 282, 191 S.E.2d 812 (1972) .....	3
<i>In Re Griffiths</i> , 413 U.S. 717 (1973) .....	38

## TABLE OF AUTHORITIES—Continued

	Pages
<i>International Organization of Masters, Mates and Pilots v. Andrews</i> , 626 F.Supp. 1271 (D. Alaska 1986) .....	16
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961) .....	30
<i>Leis v. Flynt</i> , 439 U.S. 438 (1979) .....	20, 21, 43
<i>Lowrie v. Goldenhersh</i> , 716 F.2d 401 (7th Cir. 1983) .....	20
<i>Matter of Titus</i> , 213 Va. 289, 191 S.E.2d 798 (1972) .....	3, 29
<i>Norfolk and Western Railway Company v. Beatty</i> , 423 U.S. 1009 (1975), <i>summarily aff'g</i> , 400 F. Supp. 234 (S.D. Ill.) .....	20
<i>Ohralik v. Ohio State Bar Association</i> , 436 U.S. 447 (1978) .....	30
<i>Sestric v. Clark</i> , 765 F.2d 655 (5th Cir. 1985), <i>cert. denied</i> , 106 S.Ct. 862 (1986) .....	15, 17, 46, 47
<i>Sommermeier v. Supreme Court of Wyoming</i> , 659 F.Supp. 207 (D.Wyo. 1987), <i>appeal pending</i> , No. 87-1811 (10th Cir.) .....	15, 16, 17
<i>Shapiro v. Cooke</i> , 552 F.Supp. 581 (N.D.N.Y. 1982) .....	19
<i>Supreme Court of New Hampshire v. Piper</i> , 470 U.S. 274 (1985) .....	passim
<i>Toomer v. Witsell</i> , 334 U.S. 385 (1947) .....	22, 26, 41, 42, 43
<i>United Building &amp; Construction Trades Council v. Mayor &amp; Council of the City of Camden</i> , 465 U.S. 208 (1984) .....	13, 14, 16, 22, 42, 43
<i>United States v. Howard</i> , 352 U.S. 212 (1957) .....	2
CONSTITUTIONAL PROVISIONS	
Article IV, § 2 .....	2, 4, 11, 14, 16, 17, 19

## TABLE OF AUTHORITIES—Continued

	Pages
STATUTES AND RULES	
28 U.S.C. § 1254(2) .....	2
28 U.S.C. § 1257 .....	2
Indiana Rules for Admission to the Bar and the Discipline of Attorneys Rule 6 .....	9
Iowa Code Annotated Section 60 Appendix, Rule 114(a) .....	9
Michigan Compiled Laws Section 600.946 .....	10
Ohio Supreme Court Rules for the Government of the Bar Rule I, § 9(g) .....	9
Oklahoma Rules for the Admission to Practice Rule 216 .....	10
Rules of the Supreme Court of Illinois Rule 705 .....	9
Rules of the Supreme Court of Virginia Rule 1A:1 .....	<i>passim</i>
Rule 1A:3 .....	3
Rule 1A:4 .....	8
Rules of the Supreme Court of Virginia, Integration of the Bar	
Part 6, § II, Canon 2, EC 2-2 .....	32
Part 6, § II, Canon 8, EC 8-1 .....	33
Part 6, § II, Canon 9, DR 9-102 (E) (2) .....	32
Part 6, § VI, ¶ 2 .....	30
Part 6, § VI, ¶ 6 .....	31
Part 6, § VI, ¶ 9(d), (i) .....	31
Part 6, § VI, ¶ 13 .....	31

## TABLE OF AUTHORITIES—Continued

	Pages
Rules of the Supreme Court of Tennessee Rule 7, § 103(u) .....	10
Rules of the Supreme Court of Vermont Rule T. 12, Appendix I, Part II, § 7(d) .....	10
Virginia Statutes, Section 54-67 .....	5
Wyoming Statutes, Section 33-5-110 .....	10
MISCELLANEOUS AUTHORITIES	
ABA/BNA Lawyers Manual on Professional Responsibility, Vol. I, No. 41 (August 7, 1985) .....	47
ABA/BNA Lawyers Manual on Professional Responsibility, Vol. 1, No. 50 (December 11, 1985) .....	37
COMPREHENSIVE GUIDE TO BAR ADMIS- SION REQUIREMENTS, 1986 (American Bar Association/National Conference of Bar Examiners) .....	9
Forty-Eighth Annual Report Of The Virginia State Bar, June 30, 1986 .....	32
Haftner, <i>Toward the Multistate Practice of Law Through Admission by Reciprocity</i> , 53 Miss. L.J. 1 (1983) .....	9, 36, 40, 47
McCarthy, <i>Who Needs Bar Examinations?</i> , 5 CAP. U.L. REV. 197 (1976) .....	25
Note, <i>A Constitutional Analysis of State Bar Res- idency Requirements Under the Interstate Priv- ileges and Immunities Clause of Article IV</i> , 92 HARV. L. REV. 1461 (1979) .....	14
"Portrait of a Profession," Virginia Lawyers Weekly, Vol. II, No. 9 (August 3, 1987) .....	37
PROFESSIONAL ACTIVITY AND ATTITUDE SURVEY, Virginia State Bar (May 3, 1985) .....	37

## TABLE OF AUTHORITIES—Continued

Pages

“Status of IOTA Program,” Virginia Bar News, Vol. 34, No. 4 (October, 1985) .....	32
Stevens, <i>Diploma Privilege, Bar Examination or Open Admission</i> , 46 BAR EXAMINER 15 (1977) .....	19, 46
Thomas, <i>The Bar Examination: Its Function</i> , 32 BAR EXAMINER 69 (1963) .....	25

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**OPINIONS BELOW**

The memorandum order of the United States District Court for the Eastern District of Virginia was not reported and is set forth in the Appendix to the Jurisdictional Statement at Appendix B, p. A-15.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court, is reported at 822 F.2d 423 (4th Cir. 1987). The opinion is also set forth in the Appendix to the Jurisdictional Statement at Appendix A, p. A-1.

## JURISDICTION

The jurisdiction of this Court on appeal is invoked under 28 U.S.C. § 1254(2). Virginia Supreme Court Rule 1A:1, a "state statute" within the meaning of 28 U.S.C. §§ 1254(2) and 1257. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); and *United States v. Howard*, 352 U.S. 212 (1957).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The privileges and immunities clause, Article IV, § 2 of the United States Constitution, provides in pertinent part:

the citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States.

Virginia Supreme Court Rule 1A:1, entitled "Foreign Attorneys—When Admitted to Practice in This State Without Examination", is set forth in full in an Appendix appearing at the end of this brief, at p. App. 1. In summary, the rule provides for admission to the Virginia bar without examination for an attorney who has been licensed to practice law in another jurisdiction for at least five years. The applicant attorney seeking admission without examination must establish that he or she

- (a) Is a proper person to practice law;
- (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination;

- (c) Has become a permanent resident of the Commonwealth, and;
- (d) Intends to practice full-time as a member of the Virginia bar.<sup>1</sup>

Virginia Supreme Court Rule 1A:3, entitled "Revocation of Licenses Issued to Foreign Attorneys," is also set forth in full in an Appendix appearing at the end of this brief, at p. App. 2. This rule simply provides that the Supreme Court of Virginia may revoke the license of any attorney admitted pursuant to Rule 1A:1, following the receipt of satisfactory evidence that such person no longer satisfies the requirements of that rule.

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## STATEMENT OF THE CASE

### 1. Factual Background

The appellee, Myrna E. Friedman, is a resident of Cheverly, Maryland. She was admitted to the Illinois bar by examination in 1977 and the District of Columbia bar by reciprocity in 1980. J.A. 30. She worked as a corporate attorney in the District of Columbia for four years, and prior to that was employed for five years in the Office of General Counsel of the United States Navy.

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<sup>1</sup> The Supreme Court of Virginia has construed the residency provision of Rule 1A:1(c) as a "date of admission" requirement. *Matter of Titus*, 213 Va. 289, 191 S.E.2d 798 (1972). The full-time practice requirement of Rule 1A:1(d) has been interpreted to mean that an applicant must intend to open an office in Virginia for the practice of law and engage regularly in the practice of law in Virginia from that office. *In re Brown*, 213 Va. 282, 191 S.E.2d 812 (1972).

J.A. 30-31. In January, 1986, she took a job as Associate General Counsel for ERC International, Inc., a "professional services company" located in Vienna, Virginia. She had lived at various locations in Northern Virginia until February, 1986, J.A. 39, when she married and moved to her current residence. J.A. 32.

In June, 1986, she applied for admission to the Virginia bar without examination pursuant to Rule 1A:1. The cover letter attached to her application stated that she intended to reside in Maryland. J.A. 34. Her National Conference of Bar Examiners Questionnaire included with her application also disclosed that she had applied for admission to the Maryland bar at the same time. J.A. 36.

On June 17, 1986, the Clerk of the Supreme Court of Virginia responded to Friedman, advising her that because she was not a permanent resident of Virginia, she was not eligible for admission to the Virginia bar without examination, and her application fees were returned to her. J.A. 51.

On September 25, 1986, Friedman filed a complaint in the United States District Court for the Eastern District of Virginia against the Supreme Court of Virginia and its Clerk, David B. Beach, asserting that the residency requirement of Rule 1A:1 violated the United States Constitution, including the privileges and immunities clause contained in Article IV, § 2. J.A. 2-6. The issues presented to this Court were raised initially in the district court in cross-motions for summary judgment filed by Friedman and the Virginia Supreme Court. On November

14, 1986, the district court entered an order granting Friedman's motion for summary judgment and declaring the requirement of residence for admission without examination violative of the privileges and immunities clause. J.A. 12-14. On December 19, 1986, the district court entered a further order staying its judgment pending appeal.

The issues now raised in this appeal were asserted by the appellants, the Virginia Supreme Court and its Clerk, in their appeal to the United States Court of Appeals for the Fourth Circuit. On June 12, 1987, a panel of the court of appeals consisting of Winter, Chief Judge, Ervin, Circuit Judge, and Young, United States District Judge for the District of Maryland, sitting by designation, issued its opinion affirming the district court's judgment. The appellant's Petition for Rehearing in Banc was denied on July 22, 1987, and on July 31, 1987, the court of appeals entered an order staying its mandate pending appeal to this Court. Appellants timely filed their Notice of Appeal with the court of appeals.

## **2. Overview of Statutory Framework and Rules Relating to Admission to the Bar in Virginia**

The Supreme Court of Virginia has discretion to grant a certificate without examination to any lawyer who has practiced for at least three years in any state or territory of the United States, or in the District of Columbia. Va. Code § 54-67. Since at least 1907, the Supreme Court has implemented this provision by rule of court, *see* former Rule XX, 106 Va. xii (1907). According to the affidavit of Virginia Supreme Court Clerk David B. Beach, the rule was adopted "solely to make it easier

for a practicing attorney who has permanently relocated in Virginia from another jurisdiction to gain admission to the Virginia bar in cases where the relocating attorney's jurisdiction of origin accords the same privilege to Virginia practitioners." J.A. 25. The objective of the rule, as stated by Beach, "is to promote interstate mobility among providers of professional legal services, while securing for the citizens of Virginia an informed, stable and responsible bar. It was never intended to serve as a vehicle for facilitating the multi-jurisdictional practice of law." J.A. 25.

The requirements of Rule 1A:1, that the relocating attorney "has become a permanent resident of the Commonwealth," and "intends to practice full time as a member of the Virginia bar," were added simultaneously in their present form to the Foreign Attorney Admission Rule in 1961. *See* 202 Va. xii (1961). J.A. 25. According to Beach: "These provisions are interdependent, and are intended to take the place of the assurances otherwise provided by the bar examination." J.A. 26. The "assurances" provided by the bar examination are outlined in the affidavit of W. Scott Street, III, Secretary-Treasurer of the Virginia Board of Bar Examiners. Street stated that the Board "intends its examination to be a rigorous test not only of the intellectual fitness generally of an applicant to practice law, but also of the applicant's knowledge and proficiency specifically in Virginia law and procedure. In addition, the Board believes that any applicant for admission to the bar who is willing to take and pass the bar examination exhibits a sincere commitment to service to Virginia, to her bar, and to Virginia clients." J.A. 55-56.

Beach explained in his affidavit that both the full time practice and permanent residence requirements of Rule 1A:1 are necessary to establish "that attorneys seeking admission to the bar without examination have the same professional qualifications of commitment to service to the jurisdiction and familiarity with Virginia law that are demonstrated by those attorneys who gain admission to the bar by taking and passing the bar examination." J.A. 26. The full-time practice requirement promotes frequent and consistent exposure to Virginia law, and compliance with that provision is facilitated by requiring the attorney seeking admission without examination to become a permanent resident. The Virginia Supreme Court believes that "[t]he applicant's willingness to reside in the Commonwealth in lieu of taking the bar examination demonstrates his or her commitment of service to the bar of Virginia and to Virginia clients, and ensures that the demands of an out of state practice or residence in a distant location will not stand in the way of the applicant's becoming a proficient Virginia practitioner." J.A. 26-27.

### 3. Summary of Virginia Bar Composition

There is no requirement of residence in Virginia for admission to the State's bar by examination, nor is there a requirement of residence in Virginia in order to sit and take the examination. J.A. 25, 55. The record establishes that in 1985-86, 410 nonresidents sat for the Virginia bar examination. Of that number, 290 passed and were admitted to the Virginia bar. J.A. 56. With respect to total bar membership, as of June, 1986, 1,871 out of 14,314, or over 13% of all Virginia members engaged in active practice in Virginia, resided out of state. J.A. 66.

The record also demonstrates that the number of residents who attain admission to the bar pursuant to Rule 1A:1 is small. In 1985, 1,136 resident applicants sought admission to the bar by examination, while only 106 were admitted pursuant to Rule 1A:1. J.A. 54, 56. In 1986, when 1,227 resident applicants sought admission by examination, only 113 were admitted pursuant to reciprocity. J.A. 54, 56. Thus, in the two year period between 1985-86, 91% of all resident applicants to the Virginia bar sought admission by examination, while only 9% were admitted by reciprocity.

#### 4. Overview of Reciprocity Admission Requirements Among the Several States

The practice of admitting to permanent general practice, without additional examination, members of the bar of other states, is known variously as "admission by reciprocity," "admission by comity," or "admission on motion." This is distinguished from admission *pro hac vice* for the trial of a single matter. It is noted that the Rules of the Supreme Court of Virginia, Rule 1A:4, provides for admission *pro hac vice*, and there is no limitation on the types of matters or number of times out-of-state counsel may appear. While the States vary considerably in their treatment of the practice, the typical reciprocity rule requires that the applicant attorney has practiced in another jurisdiction for a prescribed period of time, is in good standing in the State of prior admission, and meets certain additional requirements or "special conditions."

In 1968, out of the fifty States and the District of Columbia, forty-one jurisdictions admitted attorneys by reciprocity without examination. By 1983, only thirty-two

States continued to provide reciprocity.<sup>2</sup> As of this writing, that number has declined to twenty-three.<sup>3</sup> Twenty States now require all applicants to take the regular bar examination,<sup>4</sup> and eight States require a "special" examination for foreign attorneys.<sup>5</sup> The nature of this special examination varies. For instance, California and Rhode Island require attorney applicants to sit for the full essay portion of the regular bar examination, while Massachusetts administers a three hour, three question essay examination on Massachusetts practice. See note 3, *supra*.

Among the States which have retained reciprocity, seven require some form of residence as a special condition for admission without examination: Illinois (residence with active and continuous practice in state), Ill. S.Ct. Rule 705; Indiana (residence or in-state office), Ind. Adm. & Disc. Rule 6; Iowa (residence or in-state office) Iowa Code Ann. § 610; Ohio (residence), Ohio S.Ct. R. for Gov't

<sup>2</sup> Hafter, *Toward the Multistate Practice of Law Through Admission by Reciprocity*, 53 Miss. L.J. 1, 6 n.8 (1983).

<sup>3</sup> ALASKA, COLO, CT, DC, ILL, IND, IOWA, KY, MICH, MINN, MD, NEB, NY, OHIO, OKLA, PA, TENN, TX, VT, VA, WVA, WIS, WYO. This information was derived from the *Comprehensive Guide to Bar Admission Requirements, 1986*, published by the American Bar Association and the National Conference of Bar Examiners. The information contained in this manual was verified and updated by this counsel where possible, between November 23, 1987 and December 4, 1987, in correspondence and telephone conversations with appropriate bar admitting authorities in the several States.

<sup>4</sup> ALA, ARIZ, ARK, DEL, FLA, GA, HAW, IDAHO, KAN, LA, MONT, NEV, NC, NH, NJ, NM, ORE, SC, SD, WASH. See note 3, *supra*.

<sup>5</sup> CAL, ME, MD, MASS, MISS, ND, RI, UTAH. See note 3, *supra*.

of Bar, R.I. § 9(g); Oklahoma (residence for temporary permit), Okla. R. Adm. to Prac., R. 216); Virginia (residence and full time practice) Va. Sup. Ct. R. 1A:1; and Wyoming (residence) Wyo. Stat. § 33-5-110.

Other States have imposed varied special conditions for admission without examination. Michigan requires an applicant to maintain an office and an active practice in the State, Mich. C.L. 600.946. Tennessee requires a statement of intent to practice in the State, Tenn. R. 7, § 103(v), while Vermont requires three months of study in the office and under the supervision of an attorney practicing in the State, VT Sup. Ct. R. T. 12 App. I, Pt. II. § 7(d).

Finally, it is noted that since this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), eight States have eliminated reciprocity admission, and now require all attorney applicants to take either the regular bar examination or a special examination.<sup>6</sup>

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### SUMMARY OF ARGUMENT

This case squarely presents the question whether the Privileges and Immunities Clause of the United States Constitution compels a State to admit to practice before her courts nonresident attorneys who have not established

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<sup>6</sup> ARK (July 1, 1985—regular exam); KAN (July 15, 1987—regular exam); MASS (July, 1985—special exam); MISS (May, 1985—special exam); MONT (January 13, 1987—regular exam); NC (eff. January, 1988—regular exam); RI (November 23, 1987—special exam); UTAH (July, 1986—special exam). See note 3, *supra*.

their competence or offered the considerable commitment to the jurisdiction demonstrated by taking and passing the State's bar examination. The court of appeals' decision declaring appellee Friedman exempt from the Virginia bar examination departs from this Court's decisions defining the scope of the privileges and immunities clause, and fails to give proper deference to the authority of the Virginia Supreme Court to regulate its bar.

The court of appeals erred in holding that admission to a State's bar without examination it is a "privilege" protected by Article IV, § 2. Waiver of the examination has never been regarded by the courts as a matter of "constitutional right"; it is a *quid pro quo* for an attorney's willingness to provide some other form of assurance of commitment to the jurisdiction and competence in local law. Twenty-eight states provide no reciprocity at all, but require *every* applicant to the bar to submit to some form of examination. Thus, the extension or refusal to extend the privilege cannot be regarded as "fundamental to the promotion of interstate harmony." Because admission without examination, in and of itself, implicates no national interest or any of the values protected by the privilege and immunities clause, any special conditions attached to the grant of reciprocity need only bear a rational relationship to a legitimate State interest. This Court has previously held that the Virginia rule satisfies that standard. *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), *summarily aff'g*, 359 F.Supp. 549 (E.D. Va.).

Even if the Virginia rule is subject to "substantial relation" scrutiny, it meets the requirements of that test.

First, there are substantial reasons for a difference in treatment, because nonresident attorneys who have multi-jurisdictional bar affiliations, and who seek admission to the Virginia bar without examination, offer no personal investment whatsoever in the State. They are entitled to no presumption that they will fulfill their public service responsibilities in the jurisdiction. The fact of nonresidence also presents special problems in securing compliance with Virginia's full time practice requirement. Thus, there is no real assurance that nonresident attorneys will have sufficient contacts with local law to become proficient Virginia practitioners. A bar examination for nonresident attorneys is the only effective alternative to secure the out-of-state applicant's personal investment in the jurisdiction, and to demonstrate the attorney's competence in Virginia substantive and procedural law.

The court of appeals erred in imposing its own legislative judgment of "less restrictive means" on the Virginia Supreme Court's exercise of discretion to provide for reciprocity admission. Where the State's interest is compelling, and the state's regulation does not result in the complete exclusion of nonresidents from the regulated activity, the federal court's inquiry should be limited to whether the regulation adopted by the State provides a "reasonable and adequate" means for a nonresident's access to the activity. *Canadian Northern Railway Company v. Eggen*, 252 U.S. 553, 562 (1920). This Court should hold that the requirement of the bar examination is a reasonable and adequate means for ensuring the competence and commitment of nonresident attorneys seeking admission to a State's bar and is a legitimate, less restrictive alternative than complete exclusion from the bar.

Finally, courts have cautioned that overly aggressive scrutiny of reciprocal admissions provisions will chase states into the certain sanctuary of a bar examination for all. Recent statistics prove that the trend away from reciprocity has commenced. A finding that the requirement of residence for admission without examination is constitutionally infirm may in fact hasten the final balkanization of the legal profession and defeat the purposes of the privileges and immunities clause. This result need not obtain, however, because residence in lieu of the bar examination clearly bears a substantial connection to legitimate State concerns. It should be upheld.

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## ARGUMENT

### I. Admission To A State's Bar Without Examination Is Not A "Fundamental Privilege" Protected By The Privileges And Immunities Clause.

This Court has repeatedly confirmed that distinctions based upon residence are not *ipso facto* precluded by the Constitution. With respect to the privileges and immunities clause, it is only "discrimination against out of state residents on matters of *fundamental concern* which triggers the Clause . . ." *United Building and Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. 208, 220 (1984) (emphasis added) (hereafter "*Camden*").

Some distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder

the formation, the purpose, or the development of a single union of those states. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident equally.

*Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 383 (1978). The threshold inquiry under Article IV, § 2 then, is whether the subject matter of the enactment "is sufficiently 'fundamental' to the promotion of interstate harmony so as to 'fall within the purview of the Privileges and Immunities Clause.'" *Camden, supra*, 465 U.S. at 218 (citations omitted).

**A. Admission to State's Bar Upon Waiver of the Bar Examination May Properly Be Viewed Independently of the Right to Practice Law Generally.**

In this case, the subject matter of the enactment under review is admission to membership in the Virginia bar by "special dispensation," i.e., without taking and passing the State's bar examination.<sup>7</sup> Aside from the Fourth Circuit's decision below, other federal courts that have addressed this question specifically have concluded that reciprocity admission without examination is not a fundamental right protected by the privileges and immunities clause.

<sup>7</sup> See Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 Harv. L. Rev. 1461 (1979), pointing out that with respect to residency, different issues may be raised "when nonresidents seek *special dispensations*, either by admission on motion based on experience as a lawyer in another state, or by special admission to argue one case . . .". *Id.* at 1465 (emphasis added).

In *Sestric v. Clerk*, 765 F.2d 655 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 862 (1986), a case nearly identical to the case at bar, a Missouri lawyer challenged on privileges and immunities grounds the Illinois reciprocity rule which required residence in the State as a condition for admission without examination, although nonresidents could be admitted by taking and passing the Illinois bar examination. The Seventh Circuit, in an opinion written by Circuit Judge Richard A. Posner, upheld the district court's grant of summary judgment for the defendants. The court, distinguishing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (hereafter "*Piper*"), found that the "privilege" to be evaluated was not the privilege to practice law generally, but the narrower issue of whether there was a constitutionally protected privilege to practice law without passing the State's bar examination. The appeals court concluded that while the requirement that nonresidents take the bar examination may be "inconveniencing," *id.* at 658, it did "not do much damage to the policy of the privileges and immunities clause." *Id.* at 659.

In *Sommermeier v. Supreme Court of the State of Wyoming*, 659 F.Supp. 207 (D. Wyo. 1987), appeal pending, No. 87-1811 (10th Cir.), Chief Judge Clarence A. Brimmer, Jr., reached this same conclusion in upholding a Wyoming law waiving the examination for experienced attorneys establishing a *bona fide* residence in the State. Judge Brimmer stated:

[I]t is highly unlikely that the privilege of avoiding the bar examination is a fundamental right. Although it is related to the professional pursuit of practicing law, it is not one itself. Moreover, the Court is hard pressed to see how avoiding the exam, by it-

self, contributes to national unity, the national economy or any other values which the privileges and immunities clause seeks to protect.

*Sommermeier, Id.*, 659 F.Supp. at 209. These cases confirm that a substantial question exists whether admission without examination ought to be considered a fundamental privilege. Virginia submits that discretionary admission without examination should be examined independently for a determination whether it is a "privilege" protected by Article IV, § 2. And, because admission without examination, in and of itself, has never been regarded, either in practice or at law, as "fundamental to the promotion of interstate harmony," the conclusions reached by the Seventh Circuit and Chief Judge Brimmer should be adopted by this Court.

In *Camden*, this Court noted that public employment "is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling." 465 U.S. at 219. Although the "hiring preference" ordinance at issue in that case was found to implicate the fundamental right, because it biased the employment decisions of private employers, the Court's opinion suggests that the determination whether a *particular activity* constitutes a protected privilege should focus on the specific activity itself. Other courts have employed this contemporary analysis to examine the specific activity at issue for a determination whether it is a matter of fundamental concern. In *International Organization of Masters, Mates and Pilots v. Andrews*, 626 F. Supp. 1271 (D. Alaska 1986), the district court considered a challenge to a State statute providing cost of living wage

adjustments to residents, but making no provision for such adjustments to nonresidents. The Court concluded that although the question of wage adjustment was *related* to the "fundamental" privilege of pursuing employment and economic opportunities in Alaska, the specific "privilege" at issue, *i.e.*, salary adjustments, was "significantly narrower" and unrelated to preserving the national economic union. *Id.* at 1283-84. See also, *Alerding v. Ohio High School Athletic Association*, 779 F.2d 315, 316-19 (6th Cir. 1985), which rejected a privileges and immunities challenge to a state regulation barring nonresident students from participating in state interscholastic sports. The court indicated that the issue was not the fundamental right to obtain an education generally, but whether there was a fundamental privilege to participate in interscholastic sports.

The cases thus support the view expressed in *Sestric, supra*, and *Sommermeier, supra*, that because the privilege of gaining admission to a State's bar without examination is, in effect, a "subspecies" of the right to practice law generally, it may be examined independently for a determination whether it is a matter of fundamental concern.

**B. There is No Overriding National Interest in Bar Admission Without Examination Which Requires Protection Under the Privileges and Immunities Clause.**

In *Piper*, this Court struck down a State rule *completely excluding* nonresidents from admission to the bar. While *Piper* held that the practice of law was protected by Article IV, § 2, 470 U.S. at 283, this finding was expressly linked to the fact that Kathryn Piper had taken and passed the New Hampshire bar examination, and established

that she fulfilled "the same professional and personal qualifications required of resident lawyers." *Id.*, n. 16. Indeed, as Justice White noted in his concurring opinion, she had "passed the New Hampshire bar," and therefore was "indistinguishable from other New Hampshire lawyers." *Piper*, 470 U.S. at 216 (concurring opinion). Thus, there was no question that Piper had proven she was knowledgeable in local law and procedure, and had affirmatively demonstrated her genuine desire to serve the administration of justice in the State of New Hampshire.

This view that the bar examination is a threshold requirement which must be satisfied before a lawyer may be presumed to be qualified was reaffirmed by the Court's more recent decision in *Frazier v. Heebe*, — U.S. —, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987) (hereafter "*Frazier*").

Indeed, there is no reason to believe that *non-resident attorneys who have passed the Louisiana bar exam* are less competent than resident attorneys. The competence of the former group in local and federal law has been tested and demonstrated *to the same extent* as that of Louisiana lawyers, and its members are *equally qualified*.

*Frazier*, *supra*, — U.S. at —, 96 L.Ed. 2d at 566 (emphasis added). In addition, the *Frazier* Court noted that the bar examination required a "personal investment" from the applicant, thus ensuring that the applicant intended a "considerable local practice" in the jurisdiction. *Id.*, 96 L.Ed. 2d at 566-67. The decisions in *Piper* and *Frazier* make clear that the "privilege" to practice law is not absolute. Until an applicant affirmatively demonstrates competence in local law and a considerable commitment to service to the jurisdiction, there is no entitlement to pursue the

"common calling" of the practice of law, and, thus, no privilege protected by Article IV, § 2.

All American jurisdictions utilize written bar examinations for the purpose of verifying the competence of applicants for licensure to practice law because the bar examination "remains the most effective, and the fairest, tool yet devised for the screening of applicants for admission to the bar."<sup>8</sup> On the other hand, only a minority of American jurisdictions, in an exercise of discretion, permit admission by reciprocity without examination. *See* note 3, *supra*. Indeed, although this Court has never addressed the issue directly, the lower federal courts have uniformly and unanimously held that a State constitutionally may require *all* applicants for admission to the bar to establish their competency by taking and passing its bar examination. *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 863 (4th Cir. 1985) *cert. denied*, 106 S.Ct. 862 (1986); *Attwell v. Nichols*, 466 F.Supp. 206 (N.D. Ga.) *aff'd*, 608 F.2d 228 (5th Cir. 1979); *Shapiro v. Cooke*, 552 F.Supp. 581 (N.D. N.Y. 1982). Twenty-eight States do, in fact, require all applicants for the bar to take an examination. Residents of those states thus are not entitled to admission without examination in any other State. As a practical matter, then, reciprocity admission has never been regarded by the courts as a matter of fundamental concern, nor can the existence or nonexistence of the practice have any impact on the vitality of the nation as a single entity.

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<sup>8</sup> Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 Bar Examiner 15, 34 (1977).

The fact remains that "[c]ourts have consistently shown deference to special conditions imposed by states on applications for admission without examination." *Goldfarb v. Supreme Court of Virginia*, *supra*, 766 F.2d at 863. Substantial deference is appropriate because reciprocity admission is, in effect, a *quid pro quo*, which relaxes the requirement of the examination for attorneys willing to comply with any special conditions which, in the legislative judgment of the admitting authority, may be necessary to secure the assurances of competence and commitment to service demonstrated by the bar examination. Courts have given substantial deference to these special conditions because of the availability of the bar examination, which serves as an adequate, alternative means of gaining admission to the bar. *See, e.g., Lowrie v. Goldenhersh*, 716 F.2d 401, 412 (7th Cir. 1983).

This view finds support in this Court's decision in *Leis v. Flynt*, 439 U.S. 438 (1979):

There is no right of federal origin that permits [out of state] lawyers to appear in state courts without meeting the state's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out of state counsel from practice altogether or on a case-by-case basis. *See, Norfolk and Western R. Co. v. Beatty*, 423 U.S. 1009 (1975), *summarily aff'g* 400 F.Supp. 234 (S.D. Ill.); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), *summarily aff'g* 359 F.Supp. 549 (E.D. Va.); *Cf., Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another.

*Leis v. Flynt*, *supra*, 439 U.S. at 443. The *Leis* Court cited with approval this Court's earlier decision in *Brown v. Supreme Court of Virginia*, *supra*, which upheld against equal protection and due process challenges the same Virginia requirement of residence for admission without examination at issue here today. These cases clearly support the proposition that so long as a nonresident may gain admission to a State's bar by taking and passing that State's bar examination, no fundamental *national* interest is implicated.

Admission by reciprocity is a practice which is reflective of the fact that this is a Nation composed of individual, sovereign States. To most States, reciprocity is a practice not regarded even as desirable. To others, it is a compromise effort intended to enhance the interstate mobility of legal practitioners while obtaining adequate assurances of attorney commitment and competence. It is not regarded, however, as a matter of fundamental concern. So long as any applicant may gain admission to a State's bar, without regard to residence, by passing the bar examination, the principles underlying the privileges and immunities clause are satisfied. Accordingly, this Court should hold that a State rule which requires residence as a special condition for admission by reciprocity does not discriminate against nonresidents on a matter of fundamental concern, and thus does not trigger scrutiny under the privileges and immunities clause.

**II. Virginia's Requirement Of Either Examination Or Continuing Residence For Attorneys Seeking Multi-Jurisdictional Bar Membership Is Substantially Related To Virginia's Compelling Interest In Maintaining A Competent Bar Committed To Serving The Public In This State.**

Even if this Court should conclude that admission without examination is a fundamental right protected by the privileges and immunities clause, this finding does not end the inquiry, for "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute," *Toomer v. Witsell*, 334 U.S. 385, 396 (1947) (hereafter "*Toomer*"), and "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Id.* As this Court stated in *Camden*:

It does not preclude discrimination against citizens of other States where there is a "substantial reason" for the difference in treatment. "[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." *Ibid.* As part of any justification offered for the discriminatory law, non-residents must somehow be shown to "constitute a peculiar source of the evil at which the statute is aimed."

*Camden*, 465 U.S. at 222, quoting *Toomer*, 334 U.S. at 398.

The purpose of Virginia's Rule 1A:1, permitting admission to the bar for experienced attorneys upon waiver of the examination, is outlined in the affidavit of David B. Beach, J.A. p. 25. Throughout the proceedings in the courts below, appellee Friedman has asserted that reciprocity admission is, or ought to be, a "fast track, low cost

vehicle" for facilitating the *multi-jurisdictional* practice of law. That has never been Virginia's reason for allowing reciprocity. The Virginia reciprocity rule is intended to apply to a narrowly defined class of persons for a specific objective, i.e., to attract new lawyers who are willing to relocate to Virginia.

The Virginia rule permitting admission without examination was adopted . . . solely to make it easier for a practicing attorney who has permanently relocated in Virginia from another jurisdiction to gain admission to the Virginia Bar in cases where the relocating attorneys' jurisdiction of origin accords the same privilege to Virginia practitioners. The purpose of the rule is to promote interstate mobility among providers of legal services, while securing for the citizens of Virginia an informed, stable and responsible bar.

Beach Affidavit, J.A. 25. While the rule has existed in variety of forms since the early 1900's, it was amended in 1961 to require that the attorney seeking admission without examination "has become a permanent resident of the Commonwealth" and "intends to practice full time as a member of the Virginia bar." These requirements were added simultaneously and became effective on April 1, 1961. See 202 Va. xii (1961). "These provisions are interdependent, and are intended to take the place of the assurances otherwise provided by the bar examination." See Beach Affidavit, J.A. 26.

The specific assurances provided by the Virginia bar examination are set forth in the affidavit of W. Scott Street, III, Secretary-Treasurer of the Virginia Board of Bar Examiners. Street states that the Board intends its examination "to be a rigorous test not only of the intellec-

tual fitness generally of an applicant to practice law, but also of an applicant's knowledge and proficiency specifically in Virginia law and procedure." In addition, the Board believes that any applicant for admission to the bar who invests the time and energy necessary to take and pass the bar examination "exhibits a sincere commitment to service to Virginia, to her bar, and to Virginia clients." J.A. 55-56.

This Court has confirmed that the bar examination plays a crucial role in establishing an attorney's commitment to service to the jurisdiction and knowledge of local law. "As a practical matter, we think that unless a lawyer has, or anticipates, a considerable practice in the New Hampshire courts, he would be unlikely to take the bar examination . . . ." *Piper*, 470 U.S. at 285. The *Piper* Court also noted that taking the bar examination evidences an attorney's willingness to remain accountable to the jurisdiction. "One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire." *Id.*, 470 U.S. at 286-87.

Moreover, in *Frazier*, this Court observed that "[a] lawyer's application to a particular bar is likely to be based on the expectation of a considerable local practice, since it requires the *personal investment* of taking the state bar examination . . . ." *Frazier*, — U.S. at

—, 96 L.Ed. 2d at 566-67.<sup>9</sup> Where an attorney seeks admission to a state's bar without examination, however, there is no such personal investment, and the assurances inhering in the bar examination are not provided. Accordingly, the Virginia Supreme Court relies upon both the full-time practice and permanent residence requirements of rule 1A:1 to ensure that attorneys seeking admission to the bar without examination will demonstrate the same commitment to service and familiarity with Virginia law that are demonstrated by applicants securing admission upon examination.

The full-time practice requirement promotes attorney proficiency in local substance and procedure by mandating frequent and consistent exposure to Virginia law. As the Virginia Supreme Court has explained, the rule was adopted out of a concern that "the infrequency of [an attorney's] contacts with Virginia law would stand in the way of his becoming a proficient Virginia practitioner." *Matter of Brown*, 213 Va. 282, 287 (1972). This provision of the rule has been upheld against due process, equal protection and commerce clause challenges. See, *Goldfarb v. Supreme Court of Virginia*, *supra*; *Brown v. Supreme Court of Virginia*, *supra*. The residence requirement, in lieu of the bar examination, serves two distinct purposes.

<sup>9</sup> The literature also confirms that the bar examination serves the public interest by protecting citizens from unskilled practitioners, and safeguarding courts from confusion or congestion that might result if advocates were unfamiliar with principles of law or local practice. In addition, the examination serves as an "educational stimulant," in that it compels a bar applicant to take the time to study and learn the particulars of local substantive and procedural law. See generally, McCarthy, *Who Needs Bar Examinations?*, 5 Cap. U.L. Rev. 197, 209 (1976); Thomas, *The Bar Examination: Its Function*, 32 Bar Examiner 69 (1963).

It is intended, first, to provide a concrete demonstration of the untested applicant's commitment in fact to service to the bar of Virginia and to Virginia clients, and, second, to facilitate compliance with, and the enforcement of, the full time practice requirement. These justifications are substantial, both in their reasons for the difference in treatment of nonresidents, and in their relation to the State's objectives.

The first prong of the privileges and immunities test, that "there is a substantial reason for the difference in treatment", *Piper*, 470 U.S. at 284, stems from the *Toomer* Court's observation that the Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer*, 334 U.S. at 396. In this regard, it must somehow be shown that nonresidents "constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398. It has also been stated, in defining this test, that a State's discrimination against nonresidents is permissible where "the presence or activity of nonresidents is the source or cause of the problem or effect with which the State seeks to deal . . . ." *Baldwin*, 436 U.S. at 402 (Brennan, J., dissenting).

In this case, Virginia submits that the status of non-residence presents peculiar or special problems which justify Virginia's bar admission rules singling out nonresidents for admission to the bar *solely* by examination. As will be shown below, nonresident attorneys who seek admission without examination have no personal investment in the jurisdiction. They have made no commitment whatsoever to the administration of justice in the State, and are en-

titled to no presumption that they will willingly and actively participate in bar activities and obligations, or fulfill their public service responsibilities to the State's client community. This is particularly so where the nonresident attorney is admitted to the bar of one or more other jurisdictions. Nonresidence also presents special problems in securing compliance with Virginia's full-time practice requirement. Thus, there is no real assurance that nonresident attorneys will become proficient Virginia practitioners.

The second prong of the test requires a showing that "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284; *see also*, *Baldwin*, 436 U.S. at 402 (Brennan, J., dissenting). In this case, the discrimination practiced against nonresidents is the requirement that they take the bar examination in order to gain admission to the Virginia bar. As will be shown below, a bar examination for nonresidents is necessary in order to demonstrate a personal investment in the jurisdiction which would otherwise be established by the attorney's residence in the Commonwealth. In addition, where the attorney is admitted to the bar by examination, the full-time practice rule is not applicable, and thus the peculiar problems presented in securing compliance and enforcement of that rule with respect to nonresidents are eliminated. Virginia's rules requiring attorney applicants for admission to the bar to either pass the bar examination or reside in the Commonwealth satisfy any formulation of this test.

**A. Nonresident Attorneys with Multiple Bar Membership Who Seek Admission to Another State's Bar Present Peculiar or Special problems which Justify Different Treatment.**

In *Piper*, this Court invalidated the New Hampshire Supreme Court's rule requiring residence for admission upon examination because it found no substantial reason for the discrimination against nonresidents. Indeed, the so-called "evil" to which the New Hampshire rule was addressed was nonresidency itself. In this case, however, the "independent reason" or "peculiar source of the evil" sought to be addressed by the Virginia reciprocity rule is not solely non-residency, but is the lack of a commitment to public service to any one jurisdiction which flows from *multiple bar membership*. Like the appellee in this case, nonresident applicants who seek membership in the Virginia bar will likely retain their membership in the bar of one or more other States.<sup>10</sup> Where an attorney is admitted to practice in more than one State, that attorney is obliged to *divide* his or her commitment to public service among *each* of those jurisdictions, i.e., to provide service to clients, fulfill bar obligations and participate in bar activities. In addition, that attorney would require familiarity with, and would be subject to, diverse rules of practice and procedure, and different standards regulating, among other things, lawyer advertising and solicitation; limitations and conditions on fee arrangements and trust account proced-

<sup>10</sup> The appellee, for instance, is already admitted to the Illinois and District of Columbia bars, and her application for admission to the Virginia bar disclosed that she was seeking admission to the Maryland bar at the same time. J.A. 36.

ures; differing continuing ethical and legal education requirements; and the like.

Multiple bar membership thus exposes a practitioner to potentially conflicting standards of practice among different jurisdictions, and would result in a dilution of the practitioner's commitment and service to Virginia clients and to bar related activities and obligations. While the Virginia Supreme Court historically does not favor multi-state admission, *see Matter of Titus*, 213 Va. 289, 294-95 (1972) ("... a hit and run type practice would develop . . ."), it does not prohibit multi-state status among practitioners admitted to the Virginia bar. It does require, however, that all multi-state practitioners demonstrate their commitment to the Virginia bar particularly, and their proficiency and understanding of Virginia law and ethical requirements especially, by taking and passing the State's bar examination. Alternatively, if a practitioner admitted in another jurisdiction seeks admission to the Virginia bar without offering the assurances of commitment and proficiency provided by the examination, then that practitioner must be willing to sever ties with his or her other jurisdictions, including closing out any former practice, and moving his or her residence to Virginia.

**B. Virginia's Interests in Requiring A Commitment To The Jurisdiction Are Substantial.**

The Supreme Court of Virginia's believes that a practitioner's "commitment to the jurisdiction" is more than a platitude. Virginia expects its lawyers to be guided by a spirit of public service in all their endeavors as members

of this bar. The commitment required by the Virginia Supreme Court's rules and ethical standards entails a commitment to the protection and service of Virginia clients; a commitment to participate willingly in the activities and obligations of the Virginia bar; and a commitment to improve the legal system and further the administration of justice in Virginia. This Court has specifically approved the public service aspects of the practice of law.

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced, and to which it is dedicated. The present members of this court, licensed attorneys all, could not feel otherwise. And we would have reason to pause if we felt that our decision today would undercut that spirit.

*Bates v. State Bar of Arizona*, 433 U.S. 350, 368 (1977). See also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 461 (1978) (service and protection of clients further the goals of "true professionalism").

The lawyer's commitment to the Virginia bar likewise requires willing participation in the spirit of public service. The Virginia State Bar is a fully integrated bar, with membership required of all attorneys admitted to practice in the courts of the Commonwealth. See Rules of the Supreme Court of Virginia, Rules for the Integration of the Bar, Part 6, § IV, ¶ 2; *Button v. Day*, 204 Va. 547, 132 S.E.2d 292 (1963). This Court has held that lawyers may be required to support a professional bar organization, despite disagreement with its public positions or policies, because of the greater benefit to the profession and to society that would result from an integrated bar. *Lathrop v. Donohue*, 367 U.S. 820, 843-45 (1961). Virginia also ad-

heres to the view, often expressed by this Court, that lawyers are "officers of the courts", and are essential to the primary governmental function of administering justice. *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-62 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). In Virginia, bar members are expected to participate in all phases of bar governance and the implementation of its objectives,<sup>11</sup> including the selection of Bar Council members in each of Virginia's thirty-one judicial circuits, Rules of the Supreme Court of Virginia for the Integration of the Bar, Pt. 6, § IV, § 6; participation when appointed in disciplinary committee proceedings in Virginia's ten District Committee jurisdictions, Pt. 6, § IV, § 13; participation in judicial nomination and recommendation proceedings at the judicial circuit level upon the creation of a vacancy on the bench in that circuit; see, e.g. Art. VII, § 7.01, By-Laws of the Bar Association of the City of Richmond; and participation in the numerous standing committees and substantive law sections established to promote and improve the administration of justice in Virginia. Pt. 6, § IV, ¶ 9(d).

Virginia also seeks the support of its bar members in the bar's Interest on Trust Accounts Program (IOTA), a *voluntary* program in which participating attorneys pay all interest income earned on their attorneys' trust ac-

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<sup>11</sup> These objectives are: "To cultivate and advance the science of jurisprudence; to promote reform in the law and judicial procedure; to facilitate the administration of justice; to uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession; to encourage higher and better education for membership in the profession; and, to promote a spirit of cordiality and brotherhood among the members of the Virginia State Bar." Pt. 6, § IV, ¶ 9(i).

counts to the Virginia Bar Foundation, which distributes the funds primarily to Virginia's legal aid programs serving indigent Virginians. The IOTA program generated \$663,834.00 for distribution to these public interest programs in the 1984-85 fiscal year. *See* Rules of the Supreme Court of Virginia, Pt. 6, § II, DR 9-102(E)(2); *Status of IOTA Program*, Va. Bar News, Vol. 34, No. 4, p. 9 (Oct. 1985).

Bar member participation also facilitates Virginia's Lawyer Referral Service. This program, operated by the bar's Special Committee on Lawyer Referral, provides a no-cost referral service to Virginia clients seeking legal assistance. Virginia bar members, who participate on a volunteer basis, agree to provide a reduced-fee consultation for any client referred by the service. The program now handles more than 2,500 calls a month from Virginia clients. *See* Forty-Eighth Annual Report of the Virginia State Bar, June 30, 1986, pp. 85-86.

Virginia's disciplinary rules, in conjunction with the bar's Special Committee on Public Education, also promote attorney involvement in public service activities relating to furthering the administration of justice and improving the legal system in Virginia. The Rules of the Supreme Court of Virginia, Ethical Considerations of Canon 2, provide that lawyers "should encourage and participate in educational and public relations programs concerning our legal system, with particular reference to legal problems that frequently arise," and to participate in "seminars, lectures, and civil programs . . . to increase the public's awareness of legal needs and its ability to select the most appropriate counsel." Rules of the Su-

preme Court of Virginia, Pt. 6, § 2, Canon 2, EC 2-2. In addition, the Ethical Considerations of Canon 8 hold that "lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus, they should participate in proposing and supporting legislation and programs to improve the system. . . ." Rules of the Supreme Court of Virginia, Pt. 6, § 3, Canon 8, EC 8-1.

This Court concluded in *Piper* that nonresident bar members would not be "disinclined to do their share of *pro bono* and volunteer work," and along with resident bar members "could be *required* to represent indigents and perhaps to participate in formal legal aid work." 470 U.S. at 287. Virginia does not dispute that these conclusions are appropriate in circumstances where nonresident bar members, like Piper, have taken and passed the State's bar examination. Their application to attorneys who have made no "personal investment" in the jurisdiction, however, is unwarranted. Attorneys seeking multi-jurisdictional bar admission through "fast track, low cost" reciprocity procedures are not entitled to a presumption that they will facilitate the governance and public service functions of a State bar. It is simply illogical to presume that an attorney admitted to the bar in Virginia, Maryland and the District of Columbia will participate in bar governance functions, bar disciplinary functions, judicial selection procedures, bar programs intended to promote and improve the administration of justice, public education programs, trust account interest or lawyer referral programs in three different States.

Indeed, after the district court's decision in this case, one of plaintiff's counsel observed that while 'the *extras* offered by Friedman, such as a willingness to do *pro bono* work, may not be absolutely necessary, Attorney McLaughlin would advise submission of such an affidavit *where possible*.' J.A. 19. Thus, in Friedman's counsel's formulation, support for the bar is an "extra" to be accommodated "where possible." And even if we could presume that multi-jurisdictional practitioners would make an effort to support the bar's public service functions, there is no question that those attorneys would be obliged to *divide* their participation among the several jurisdictions in which membership is obtained. Multiple bar membership thus diminishes the lawyers ability to become and remain active. This does not satisfy the commitment to the Virginia bar envisioned by the Virginia Supreme Court, and accordingly, the court requires from such attorneys some *affirmative* showing of a high level of commitment.

Finally, while the Fourth Circuit did not address Virginia's contention that residence in the State ensures the untested attorney's commitment to the jurisdiction, the court's opinion contains language which suggests that the full-time practice component of the rule fulfills this function. *Friedman, supra*, 822 F.2d at 429. This is not the case. The "promise" of full-time practice included in Virginia's Foreign Attorney Application is just that and no more. Unlike the bar examination, or residence in the state, both of which provide a concrete demonstration of a practitioner's commitment to a continuing presence in the State, it requires no personal investment on the part of an

applicant to simply sign the application document containing the full-time practice admonition. And as will be shown below, that requirement may be more easily circumvented by a nonresident who continues to maintain ties to another jurisdiction.

In any event, the fact that Virginia may have adopted a more effective reciprocity program, including requiring residence *and* full-time practice, ought not to be a basis for striking down the Virginia Supreme Court's effort to maintain a committed and competent bar. Such a result is undesirable in a properly functioning federal system of co-existing State and national jurisdictions, and is not mandated by any of the policies underlying the privileges and immunities clause.

#### **C. Virginia's Interests in Promoting Compliance With its Full-Time Practice Requirement are Substantial**

As stated previously, Virginia relies upon the full-time practice component of Rule 1A:1 to promote familiarity with Virginia law among practitioners who are exempted from the bar examination. It is noted that aside from the Virginia Supreme Court's reliance on the good faith of an applicant's assertion that he or she "intend[s] to practice full-time as a member of the Virginia bar," or the receipt of a third party complaint that the Rule is being violated, there is no other readily available mechanism for monitoring or enforcing that requirement for all foreign attorneys who have been or may be admitted without examination. As one commentator has noted, "[a] requirement of 'continuing practice' measured in billable hours per year performed within the subject

jurisdiction would present substantial policing problems.” *Haft*, note 2, *supra*, at 41, n. 138. Neither would it be feasible or desirable to maintain an investigative staff to monitor adherence to the rule. Accordingly, as an alternative to the establishment of a complex administrative enforcement mechanism, the Virginia Supreme Court determined that the physical presence in the state entailed by residence would ensure compliance with full-time practice. Residence promotes this objective in three ways. It insulates the practitioner from the demands of a former or potentially developing out-of-State practice, it ensures that the practitioner will remain subject to the continuing scrutiny of the legal community, and it helps to define and lend consistency to the in-State requirement of the full-time practice provision.

The Fourth Circuit dismissed these justifications for residency asserting that there was no evidence in the record to suggest that Friedman would not take her promise of full-time practice seriously. The fallacy of the court’s argument, however, aside from the fact that it requires Virginia to presume the integrity of any non-resident applicant for admission, is that Virginia’s foreign admission rule does not apply only to “in-house corporate counsel,” with a narrow and focused practice such as Friedman. There is no dispute that in-house counsel constitutes a fundamentally unique type of practice. The American Corporate Counsel Association (ACCA) has long asserted that because in-house corporate counsel practitioners do not serve the public generally, they should be treated differently for purposes of bar admission requirements. In fact, ACCA has advocated a national standard

for admission that would *exempt* inside corporate counsel from its requirements. See ABA/BNA Lawyers Manual on Professional Responsibility, Vol. 1, No. 50, p. 1095 (Dec. 11, 1985). Virginia’s foreign attorney admission rule, however, must apply to all attorneys seeking reciprocity admission, the bulk of whom will be sole practitioners or associated with law firms. Two recent surveys conducted among bar members in Virginia show that only eight percent of all active practitioners in Virginia are “in-house counsel.”<sup>12</sup> On the other hand, 26 percent are partners in law firms and 23 percent are sole practitioners with their own office or an office sharing arrangement.<sup>13</sup>

These figures support the conclusion that most non-resident reciprocity applicants may have been or will be associated with an office or firm in their jurisdiction of residence, or like many sole practitioners, also operate out of an office in their home. They will likely have an established body of clients who would continue to seek legal services in their home jurisdiction, and through their out-of-state personal and community associations would generate new client contacts. Given these circumstances, there is logically a much greater likelihood that nonresident attorneys would be inclined more than residents to main-

<sup>12</sup> In addition, 70 percent are identified as “private practitioners”, 11 percent are “government lawyers,” and those remaining are judges, law school faculty, or in “other” categories. See *Professional Activity and Attitude Survey*, Virginia State Bar (May 3, 1985), p. 9 (based upon responses from 5,100 active members of the Virginia bar).

<sup>13</sup> See, “Portrait of a Profession”, *Virginia Lawyers Weekly*, Vol. II, No. 9, August 3, 1987, p. 1, 16, (original survey results and tables also available in the offices of the Virginia Lawyers Weekly, 1205 East Main Street, Richmond, Virginia 23219).

tain or acquire an out-of-state practice and deviate from the restrictions of full-time practice, thus defeating the purpose of that provision. The requirement of residence in the State therefore serves in a concrete fashion the legitimate purpose of facilitating compliance with the full-time practice rule, because it insulates the multi-jurisdictional practitioner from the demands of a former or potentially developing out-of-state practice.

The requirement of residency for applicants admitted to the bar without examination also aids the enforcement of the full-time practice requirement because it ensures that the untested practitioner will remain subject to the continuing scrutiny of the legal community in Virginia. *See, e.g., In Re Griffiths*, 413 U.S. 717, 726 (1973) ("once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts"). A non-resident practitioner can more easily avoid detection of non-compliance with full-time practice simply by virtue of the fact that his or her activities outside the state are not subject to monitoring by the legal community in Virginia. Effective enforcement of full-time practice thus requires that an attorneys' principal contacts remain in Virginia, within the purview of the Virginia legal community. The enhanced exposure of the untested resident attorney to the Virginia community minimizes the possibility that the practitioner may establish a sham office or "mail drop" in the state to avoid compliance with full-time practice.

Finally, because they are mutually reinforcing provisions, the residence requirement of Rule 1A:1 is effective

in providing a consistent and understandable interpretation of the full-time practice requirement. Absent the clear and unequivocal mandate of in-state *residence*, the in-state obligations of the untested attorney will be subject to "interpretation." For example, following the district court's decision in this case, Randall Scott, the Executive Director of the District of Columbia Bar Association, offered his own interpretation of the commitment to full-time practice.

The crucial issue in assessing the impact of the *Friedman* case for practitioners served by this association, said Scott, is the interpretation of (4)(d) of Rule 1A:1, which requires an attorney to "intend" to practice full time in Virginia. "If a well-formed, honest intent at the time of application to practice full time in Virginia is sufficient for admission on motion, the impact of the decision could be significant," stated Scott. The question is whether there is any authority to revoke a license if the bona fide intent to practice in Virginia was evidenced at the time of admission. J.A. 19-20.

Under Scott's interpretation, so long as one "intends" to practice full-time upon admission, it is immaterial if one has a change of heart later on. Scott's comments are illustrative of a cavalier attitude which belies the Fourth Circuit's assertions that nonresidents are no less likely to honor their promise to practice full-time in Virginia, or that compliance with full-time practice could be assured by requiring an "annual renewal" of the attorney's promise. An annual promise demonstrates no personal investment in the jurisdiction. If the requirement of residence were eliminated, the only concrete assurance of an in-state full-time practice would disappear, and the rule would be subject to self-serving interpretation and chicanery.

Finally, it may reasonably be predicted that if the requirement of residence were eliminated from Virginia's rule, the number of reciprocity admissions would greatly increase, and the difficulties in ensuring compliance with full-time practice would be significantly compounded. By way of example, one commentator noted that from 1975 through 1981, there were 19,772 new attorneys admitted to practice in the District of Columbia. Of that number, 11,456 were admitted by reciprocity (an average of 1,636 per year) while only 8,316 were admitted by examination.

[Th]e volume of admissions by reciprocity in the District can only be explained by the absence of residency requirements that allow attorneys who have no intention of relocating their homes and principal places of practice in the District of Columbia area to be freely admitted to its bar on motion. While the District of Columbia is not a typical jurisdiction, its experience with respect to the frequency of reciprocal admission, in the absence of residency requirements, is instructive of what may occur in other jurisdictions.

Hafter, note 2, *supra*, p.37.<sup>14</sup> If Virginia cannot rely upon an attorney's residence in the jurisdiction to ensure compliance with its full-time practice requirement, it simply will not be able to rely on full-time practice as a means of assuring that attorneys admitted without examination are qualified as proficient Virginia practitioners.

In light of all the above, Virginia submits that its justifications for the requirement of residence in the State

<sup>14</sup> Friedman's own evidence illustrates the volume of reciprocity admissions in the District. She applied for admission in April, 1978, but did not gain admission until March, 1980. As she explained, "[d]elay in time was due to large numbers of applications for admission by motion received by the District of Columbia." J.A. 41.

upon admission to the bar without examination are substantial, not only in their reasons for the difference in treatment of residence and nonresidency, but also in the relation of those reasons to Virginia's legitimate objectives of maintaining a knowledgable and technically competent bar with a commitment to service in the Commonwealth.

As a final matter, this Court has noted that in deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of "less restrictive means." *Piper*, 470 U.S. at 284. The application of less restrictive means analysis to this case will now be considered.

### III. A Stringent Application Of The Less Restrictive Means Test Is Inappropriate In This Case, Because Nonresidents Are Not Excluded From Admission To The Virginia Bar, And Passing The State's Bar Examination Is A "Reasonable And Adequate" Means By Which Admission May Be Obtained.

"Less restrictive means" analysis in the context of the privileges and immunities clause was first articulated by this Court in *Toomer v. Witsell*, *supra*. There, the Court held that nonresident fishermen could not be required to pay a license fee of \$2,500 for each shrimp boat owned when residents were charged only \$25 per boat. Such a requirement was "so drastic as to be a near equivalent of total exclusion." *Id.*, 334 U.S. at 398. The Court noted that the State could eliminate the danger of excessive trawling through less restrictive means, by restricting the type of equipment used in its fisheries, graduating license fees according to the size of the boats, or indeed "even [charging] nonresidents a differential which would merely com-

pensate the State for any added enforcement burden they may impose . . . .” *Id.*, 334 U.S. at 398. This form of analysis was not employed again until the Court’s decision in *Piper* which, citing *Toomer*, noted that “the Court has considered the availability of less restrictive means.” The common thread in these two cases is that consideration of less restrictive means is appropriate where an enactment results in the “total exclusion” of nonresidents from the regulated activity.<sup>15</sup>

Less restrictive means analysis has been strongly criticized. As Chief Justice Rehnquist noted in his dissenting opinion in *Piper*:

[S]uch an analysis, when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another “less restrictive” way to write it. This approach to judicial review, far more than the usual application of a standard of review, tends to place courts in the position of second guessing legislators on legislative matters. Surely this is not a consequence to be desired.

*Piper*, 470 U.S. at 295-96 (Rehnquist, J., dissenting). An overly broad application of less restrictive means analysis conflicts with this Court’s observation that “every inquiry under the privileges and immunities clause must . . . be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.”

<sup>15</sup> It is noted that in *Hicklin v. Orbeck*, 437 U.S. 518, 528 (1978), the Court stated that the State’s means must be “closely tailored” to achieving the State’s ends. The Court, however, did not suggest in that case any less restrictive means by which Alaska could achieve its goal of aiding the unemployed.

*Camden*, 465 U.S. at 223-24, quoting *Toomer*, 334 U.S. at 396.

This case presents for the first time unique circumstances requiring further consideration of the scope of less restrictive means analysis. Unlike *Piper*, we are not concerned here with the complete exclusion of nonresidents from the bar. Indeed, admission to the Virginia bar may be obtained, without regard to residence, by simply taking and passing the bar examination, and the record in this case establishes that over thirteen percent of all active practitioners enrolled in the Virginia bar (1,871 out of 14,314) are nonresidents admitted by examination. J.A. 56. Moreover, unlike *Toomer*, which dealt with harvesting shrimp, we are concerned here with admission to a State’s bar, a matter over which federal policy accords substantial deference to the individual, sovereign States.

This Court has long recognized that “the States have a compelling interest in the practice of professions within their boundaries, and . . . have broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 792. Moreover, “[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left *exclusively* to the states and the District of Columbia within their respective jurisdictions. The states prescribe qualifications for admission to practice and the standards of professional conduct.” *Leis v. Flynt*, *supra*, 439 U.S. at 442 (emphasis added). Indeed, the Court recently noted that its “[a]ttention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself—

here the State Supreme Court.” *Hoover v. Ronwin*, 466 U.S. 558, 580 n. 34 (1984).

In light of this authority, a State’s interest in regulating the practice of law clearly is greater than any interest a State may have in regulating shrimpers, as in *Toomer*, or pipeline workers, as in *Hicklin*. Where the State’s interest is indeed compelling, and the discrimination practiced against nonresidents is not complete exclusion, as in *Piper*, but relates to furthering legitimate State interests, this Court should be loathe to impose upon the State any less restrictive means it can imagine which, in its legislative judgment, might achieve a like result.

Here, Virginia has established the compelling nature of its State interests. It seeks to secure for the citizens of Virginia a knowledgeable and competent bar committed to serving Virginia clients and furthering the administration of justice in the Commonwealth. Virginia has heeded this Court’s admonition in *Piper* that these goals may not be achieved by denying to nonresidents the right to practice law in the Commonwealth, and has adopted a means which indisputably is less restrictive than complete exclusion. It simply requires nonresidents to take and pass the State’s bar examination. As this Court noted in *Frazier v. Heebe*, *supra*, the requirement of an examination for non-resident attorneys is a “more effective means” for ensuring lawyer competence than “complete exclusion” from the bar. *Id.*, — U.S. at —, 96 L.Ed. 2d at 367. Passing the examination demonstrates the nonresident lawyer’s personal investment in the jurisdiction, ensures that the applicant is proficient in Virginia practice

and procedure, and entitles the nonresident attorney to practice law in Virginia under the same terms and conditions as other members of the bar.

In cases such as this, a less restrictive means analysis is more appropriately guided by the principles articulated in this Court’s decision in *Canadian Northern Railway Company v. Eggen*, 252 U.S. 553 (1920). That case dealt with the fundamental privilege of “the right of a citizen of one state, . . . to institute and maintain actions of any kind in the courts of another.” This Court upheld against a privileges and immunities challenge a Minnesota statute of limitations provision which allowed only residents to sue in State court on a cause of action which would have been barred by the statute of limitations in the State where the cause of action arose. The Court stated:

The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state *upon terms which, in themselves, are reasonable and adequate* for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens.

*Eggen*, *supra*, 252 U.S. at 562 (emphasis added). These principles are appropriate for application to the case at bar. The privileges and immunities clause does not require that nonresidents be given “precisely the same rights” as resident citizens. *Id.*, 252 U.S. at 561. Where the discrimination against nonresidents is not “complete exclusion,” and the State’s authority over the subject matter of the regulation historically is exclusive and compelling, then the inquiry ought to be limited to whether the

means governing the nonresident's access to the regulated activity are "reasonable and adequate." In this case, this Court should confirm that admission to the bar by examination is a reasonable and adequate means available to nonresident attorneys who seek to practice in Virginia's courts. Indeed, it is the means which must be utilized by 91% of all Virginia residents who seek admission to the bar. The acceptance of this view would eliminate the need for this Court to second guess the State's choices in cases where the issue is not complete exclusion, and would give substance to the principle that the States should have "considerable leeway" in addressing local needs.

In this respect, the Fourth Circuit's declaration that the requirement of a bar examination itself is an unreasonable burden on the privilege of practicing law must not be permitted to stand. There is nothing unreasonable about the bar examination. As noted previously, it "remains the most effective, and the fairest, tool yet devised for the screening of applicants for admission to the bar." Stevens, note 8, *supra*. Judge Posner correctly observed that the bar examination is "a substitute commitment for residence." *Sestric v. Clark, supra*, 765 F.2d at 661.

The Virginia Supreme Court's bar admission rules thus offer the practitioner a compromise: a waiver of the bar examination for those willing to sever their ties to their former jurisdictions, and to commit their professional energies exclusively to the Virginia bar in the service of Virginia clients. For those unwilling to demonstrate this personal and professional commitment, the Virginia Supreme Court offers an alternative mechanism for

such practitioners to become members of the bar while maintaining their ties to their other jurisdictions, and that is by simply taking and passing the Virginia bar examination. These are terms which, in themselves, are reasonable and adequate for the enjoyment of any right a nonresident may have to practice law in Virginia.

Finally, it is significant that "[c]ourts have consistently shown deference to special conditions imposed by states on applications for admission without examination. . . . [T]here exists the danger that ruling conditions on reciprocal admissions unconstitutional will chase states into the one certain sanctuary of a bar examination for all." *Goldfarb v. Supreme Court of Virginia, supra*, 766 F.2d at 863. The Seventh Circuit in *Sestric v. Clark, supra*, expressed this same concern: "If Sestric's claim prevails, the states will have to decide whether to end this privilege or stand willing to admit on motion most lawyers in the country." *Sestric, supra*, 765 F.2d at 663. Another commentator has noted that an expansive application of the *Piper* decision "may have the unexpected effect of actually making it more difficult to practice across state lines." ABA/BNA Lawyer's Manual on Professional Responsibility, Vol. 1, No. 41, p. 903 (Aug. 7, 1985).

Recent statistics suggest this trend has already commenced. In 1968, forty-one jurisdictions admitted attorneys by reciprocity without examination. By 1983, that number had declined to thirty-two,<sup>16</sup> and today, only

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<sup>16</sup> Hafter, note 2, *supra*.

twenty-three jurisdictions out of fifty-one offer admission without examination. If the requirement of residency for admission without examination is found to be constitutionally infirm, the predictions of the Fourth and Seventh Circuits may become fact. The unfortunate irony of this situation is that the Constitution requires no such result. Admission without examination requirements ought to be upheld so long as they are rationally related to the state's interest in maintaining a committed and competent bar, and do not invidiously discriminate upon some suspect criterion. Privileges and immunities considerations have no connection to discretionary admission without examination. Those interests are upheld by the right of all persons, within and without the State, to gain admission to the bar by satisfying the requirements of the bar examination. It is the unnecessarily aggressive application of this constitutional provision which will deal the final blow to reciprocity.

The Virginia Supreme Court does not believe its bar admission certificate should be treated as an "honorarium" or a "collectible" to be hung in law office walls across the country. The Court demands, as it has a right to, that its attorneys have a strong commitment of service to the bar and to clients in Virginia, and that they be knowledgeable and proficient in Virginia law and procedure. The requirement of residence in lieu of examination clearly bears a substantial connection to this legitimate objective. It should be upheld.

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## CONCLUSION

The courts below erred in holding that Virginia's requirement of residence for admission without examination violates the privileges and immunities clause. The clause does not provide a basis for relief because there is no right of admission to a State's bar without examination that is "fundamental to our national interest." It is also clear that the fact of nonresidence presents peculiar or special problems which justify a bar examination for non-residents, and it cannot be disputed that the requirement of the bar examination bears a substantial relationship to the State's compelling interest in maintaining a committed and competent bar. Finally, the requirement of the bar examination for nonresident applicants serves as a less restrictive means for achieving the State's goals, and provides a reasonable and adequate means by which non-residents may gain admission to the Virginia bar.

For all of the above reasons, appellants respectfully request this Honorable Court to reverse the decision below and enter judgment in their favor.

*Respectfully submitted,*

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## APPENDIX

App. 1

*Rule 1A:1. Foreign Attorneys—When Admitted to Practice in This State Without Examination.*

Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.

The applicant shall:

(1) File with the clerk of the Supreme Court at Richmond an application, under oath, upon a form furnished by the clerk.

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he is entitled to practice law, stating that he has been so licensed for at least five years.

(3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.

(4) Pay a filing fee of fifty dollars.

Thereafter, the Supreme Court will determine whether the applicant:

(a) Is a proper person to practice law.

(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

(c) Has become a permanent resident of the Commonwealth.

## App. 2

(d) Intends to practice full time as a member of the Virginia bar. In determination of these matters the Supreme Court may call upon the applicant to appear personally before a member of the Court or its executive secretary and furnish such information as may be required.

If all of the aforementioned matters are determined favorably for the applicant, he shall be notified that some member of the Virginia bar who is qualified to practice before the Supreme Court may make an oral motion in open court for his admission to practice law in this Commonwealth.

Upon the applicant's admission he shall thereupon in open court take and subscribe to the oaths required of attorneys at law, where upon he shall become an active member of the Virginia State Bar.

### *Rule 1A:3. Revocation of Licenses Issued to Foreign Attorneys.*

Following receipt of evidence satisfactory to the Supreme Court that a person who has been admitted to practice pursuant to Rule 1A:1 no longer satisfies the requirements of clause (c) or (d) of that section or that a person who has been admitted to practice pursuant to Rule 1A:2 no longer satisfies the requirement of clause (c) of that section, the Supreme Court may revoke the license issued to him. Following receipt of evidence that a person who has been admitted to practice pursuant to Rule 1A:1 or Rule 1A:2 has been disbarred pursuant to Part Six of the Rules, the Supreme Court will revoke the license issued to him.

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